IN THE COURT OF APPEALS OF IOWA

No. 0-396 / 09-1541
No. 0-687 / 10-0273
Filed October 6, 2010

HEIDECKER FARMS, INC. and ERNEST A. HEIDECKER and PAULINE HEIDECKER FAMILY TRUST, by Erna Lunn, Individually, and Officer and Director, and Co-Trustee,
Plaintiffs-Appellees/Cross-Appellants.

vs.

MARVIN HEIDECKER,
Defendant-Appellant/Cross-Appellee.

MARVIN HEIDECKER,
Counterclaimant,

vs.

HEIDECKER FARMS, INC., and ERNEST A. HEIDECKER and PAULINE HEIDECKER FAMILY TRUST, by Erna Lunn, Individually, and Officer and Director, And Co-Trustee,
Defendants to Counterclaim.

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney, Judge.

Marvin Heidecker appeals, and Erna Lunn, individually and on behalf of a family trust and farming corporation, cross-appeals from a district court decision finding the trustees did not act prudently in administering the trust. Marvin also appeals from a district court order granting an award of attorney fees. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Michael J. Houchins of Zenor & Houchins, P.C., Spencer, for appellant/cross-appellee.

Eldon J. Winkel of Eldon J. Winkel Law Office, Algona, for appellees/cross-appellants.

Heard by Vogel, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Marvin Heidecker appeals from a district court decision removing himself and his two sisters, Erna Lunn and Myra Dome, as co-trustees of a trust created by their parents. Erna Lunn, individually and on behalf of the trust and Heidecker Farms, Inc., cross-appeals. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings.

Ernest and Pauline Heidecker owned 2000 acres of farmland. They operated their farm through Heidecker Farms, Inc., which Ernest established in 1968. Their son, Marvin, has worked for Heidecker Farms since he graduated from high school. He and Ernest farmed the family's land themselves as employees of the corporation. Marvin is paid a monthly salary by the corporation and enjoys employee benefits that include housing, gas for vehicles used in the farming operation, and health insurance. Ernest and Pauline's other children, Myra Domes and Erna Lunn, are not involved in the family's farming operation although they, along with Marvin, own equal minority shares in the corporation.

In 1992, Ernest and Pauline created the Ernest A. and Pauline Heidecker Family Trust. The trust corpus was comprised of their majority shares in the corporation, plus debentures owed to them from the corporation. Ernest was appointed as the sole trustee, and Pauline was named the first successor trustee. If neither Ernest nor Pauline was able to serve as trustee, the trust named Marvin and two disinterested individuals as successor trustees. A letter written by Ernest and Pauline's attorney in 1992 to the three successor trustees stated:

> I believe it is accurate to indicate that the Heideckers have recognized the potential for differences of opinion within their family regarding the operation of the Heidecker Farms and the division of them following their death. They have given considerable thought to a procedure which is acceptable to them and which they are very anxious to have carried out. This is the reason for resorting to a majority of disinterested trustees whom they have confidence will carry out their intent.
>
> I believe it is apparent from the trust that Ernest and Pauline are anxious to see that the Heidecker Farms enterprise continues as a unit for a substantial period of time following their death. I believe it is accurate to indicate that they feel that if this is not mandated by their planning, some one or more of the heirs will compel a partitioning of the farming enterprise and they feel that this is not desirable.

To that end, the trust agreement provides in relevant part as follows:

> Upon the death of the first Grantor to die, that portion of the Trust estate which was contributed by the first Grantor to die shall be set aside and held in a separate trust, which shall be called the "Marital Trust" . . . .
>
> 1. During the lifetime of the surviving Grantor, the Trustee shall pay all the net income from the Marital Trust to the surviving Grantor, at least annually. The Trustee shall also pay to the surviving Grantor, such amounts of principal as the Trustee may deem necessary for the health, support and maintenance of the surviving Grantor.
>
> 2. Upon the death of the surviving Grantor, the Trustee shall distribute the remaining principal and undistributed income to and among those persons, and in the manner provided in Article IV which follows.

Article IV, entitled "Management and Distribution Following Death of Both Grantors," states:

> A. It is the expectation of the Grantors that, upon the death of the second of them to die, the Trust shall retain controlling interest in the corporation known as Heidecker Farms, Inc. and, in addition, the debentures which are outstanding and unpaid at that time. The Grantors, working together, have devised a very definite plan for the control and ultimate distribution of the land contained in Heidecker Farms, Inc. and it is the purpose of this article to instruct the Successor Trustees as to the manner in which they are to vote the stock of that corporation and to control its management and operation for the remaining term of this trust. It is sufficiently

> important to us that the plan herein reflected be carried out, that we instruct the Trustees to cancel the provisions made for any heir or beneficiary who may contest the plan herein contained.
>
> B. It is our intention that, upon the death of the second to die of the Grantors, the Successor Trustees designated in Article X shall qualify and become the acting Trustees of this Trust, which shall be held for the benefit of our three children. . . .
>
> C. This Trust shall have a duration of ten (10) years from the date of the death of the last Grantor to die provided, however, that if all of the Trustees and all of the beneficiaries should agree to shorten the term of the Trust, they may do so, but in no event shall the Trust last less than five (5) years. . . .
>
> D. During the continuation of this Trust, the Trustees shall vote the stock of the corporation so that the operation of the land contained in the corporation shall continue, with preference being given to the following methods of operation:
>
> 1. For at least two (2) years following the death of the last Grantor to die, the corporation shall operate the farmland in the same manner that it was being operated at the death of the last to die of the Grantors.
>
> 2. If it is not being cash rented at the end of said two (2) year period, it is our direction that the corporation lease the land on a cash rent basis, preference being given to any family member who is then actively engaged in farming. . . .
>
> 3. The third alternative is to lease the land on a crop share basis, preference being given to family members who are engaged in active farming. . . .
>
> E. It is our preference that the land not be sold during the term of the Trust. . . . If land is required to be sold prior to the termination of the Trust, any family member who is engaged in active farming shall be given the first chance to purchase all or any part of the land to be sold at 90% of its fair market value.

The trust agreement then provided for equal distribution of the trust assets to Erna, Marvin, and Myra when the trust is terminated, but specified

> the shares set aside for Marvin Heidecker or his heirs shall, specifically include the quarter section on which his residence is located and which contains the primary operating base. After this preliminary division has been made, Marvin Heidecker shall be given the right to purchase from each of the other shares, 160 additional acres at 90% of its appraised fair market value.

Ernest and Pauline amended the trust in 1996 to provide that any amounts distributable to Erna from the trust upon their death

> shall continue to be held in trust for her benefit by the Trustees of this Trust who are given the sole discretion to determine the amount and timing of any distribution of income or principal that might otherwise be made to Erna Lunn, taking into consideration her needs and further taking into consideration the liability, if any, which she may have for outstanding indebtedness of her husband, Dennis Lunn.

Ernest died in 1997. Marvin, with the help of his son, Greg, continued to run the farming operation in the same manner his father had. Marvin and Greg are hired employees of the farm corporation. Marvin has been paid an annual salary of approximately $30,000, plus periodic bonuses. Both Marvin and Greg (and a grandson as well) are furnished residences owned by the corporation. The corporation pays for the insurance and maintenance on the residences and also furnishes Marvin and his family members with health insurance, utilities, vehicle expenses, and other living expenses.

Pauline eventually moved into a nursing home, the expenses of which (about $60,000 per year) were paid for by the trust. In January 2006, spurred by a lawsuit filed by Erna, Marvin and his sisters agreed Pauline was no longer able to serve as trustee. They entered into an agreement, which was approved by the district court, appointing themselves as successor trustees with "equal voting rights and management rights with regard to the Trust." The agreement noted the two disinterested successor trustees named in the trust did not wish to act as trustees. Erna's lawsuit was dismissed, and a shareholder meeting of Heidecker Farms was held in May 2006.

Several resolutions were passed at that meeting by Erna and Myra. Marvin abstained from voting. The first resolution appointed Marvin, Erna, and Myra to the corporation's board of directors and as officers of the corporation.

The second resolution terminated Marvin's and Greg's employment with the corporation and stated all payments and benefits provided to them "including vehicles, health insurance, and residential expense payments" would be discontinued. A third resolution required "that the Heidecker Farms, Inc. land be cash rented for the 2007 crop year." The final resolution stated all farm machinery and equipment owned by the corporation should be "sold at public auction as soon as practical and the proceeds received be used principally to pay debt."

Myra had a change of heart after the meeting and rescinded her vote in favor of the above resolutions. She and Marvin agreed the farm should continue to operate as it had when Ernest was alive. Erna disagreed and filed a petition in equity, individually and on behalf of the trust and corporation,[1] against Marvin. Among other things, she sought his removal as co-trustee of the family's trust and as director and officer of Heidecker Farms, alleging he had engaged in self-dealing and acted imprudently and in bad faith in administering the trust. At the core of her complaints was her belief that Marvin was running the trust and corporation for his own benefit, rather than for the benefit of the beneficiaries and shareholders. She contended the corporation would generate more profit if the family's farmland was cash rented, rather than employing Marvin and his son to farm the land. Marvin filed an answer and counterclaim, seeking Erna's removal as co-trustee.

Prior to the trial, Erna filed a motion to compel Marvin to provide his complete individual tax returns from 1994 through 2005. He had previously

[1] For purposes of clarity, we refer to the plaintiffs as Erna.

provided her with only the schedule Fs, which report profit or loss from farming, and his W-2s for 2000 through 2005. The court ordered Marvin to produce his full tax returns for 1995 through 2006 "to any expert witness CPA designated in writing in this file by the Plaintiff." Erna never designated a CPA as an expert witness and was accordingly left with Marvin's abridged tax returns.

The case proceeded to trial in December 2008. Following two days of testimony and evidence, the district court took the matter under advisement. Pauline passed away about a month after the trial concluded. Neither party asked the court to consider the effect of Pauline's death on the issues raised in the suit. Based on the facts presented at trial, the court's ruling, which was not entered until August 2009, removed Marvin, Erna, and Myra as trustees and granted Erna's application for appointment of a receiver. The court also ordered that "[b]eginning with the 2010 crop year, the farmland of the trust shall be cash rented." It also found Marvin owed Heidecker Farms $35,778.09 and removed him as an officer and director of the corporation. The court granted Erna's claim for attorney fees, subject to a hearing to determine the amount to be paid from the trust assets.

Marvin appeals and Erna cross-appeals.[2] Marvin claims the district court erred in removing him as co-trustee of the family's trust and as director and officer of Heidecker Farms.[3] He additionally claims the court erred in appointing

[2] We note noncompliance with the rules of appellate procedure requiring the name of each witness whose testimony is included in the appendix to be inserted on the top of each appendix page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).

[3] At the conclusion of his appeal brief, Marvin specifically requests reversal of the order removing *all* the trustees—Marvin, Erna, and Myra—as trustees of the Heidecker Family Trust.

a receiver and modifying the terms of the trust to require cash renting of the family's farmland. In her cross-appeal, Erna claims the district court should have ordered Marvin to (1) produce his full income tax returns; (2) provide a full accounting and greater reimbursement to the corporation; and (3) buy Erna's shares in the corporation or sell his shares to her. She additionally claims the court should have required the receiver to convert the class-C corporation into three sub-S corporations for tax purposes.

After the parties appealed and cross-appealed, the district court held a hearing on the issue of Erna's claim for attorney fees, expert witness fees, and costs. The court approved the claim in the amount of $50,180.76. The clerk of court then entered judgment against Marvin. The court later issued an order nunc pro tunc providing that the award be a judgment against the trust, not Marvin. Marvin appealed. A motion to consolidate the appeals was denied by the supreme court. Since Marvin's appeal regarding the award of fees and costs was transferred to this court prior to the submission of the first appeal, we will decide both appeals in this opinion.

II. Scope of Review.

This case was filed and tried in equity. We accordingly review the issues presented de novo. Iowa R. App. P. 6.907 (2009); *Schildberg v. Schildberg*, 461 N.W.2d 186, 190 (Iowa 1990).

III. Discussion.

A. Removal of Trustees.

The district court specifically granted Erna's request for removal of Marvin as trustee and then removed all the other trustees as well. We begin our

discussion of this issue with the following principles enunciated by the Iowa Supreme Court in *Schildberg*:

> Iowa courts have the authority to remove and replace trustees when there is sufficient reason to do so to protect the best interests of the trust and its beneficiaries. While courts have a wide latitude of discretion in such matters, they consistently decline to order removal of a trustee unless such action is clearly in the best interests of the trust and its beneficiaries. The power to remove a trustee should be used only when the objects of the trust are endangered. It is clear . . . that a trustee does not merely serve at the pleasure of the trust beneficiaries. The key to removal is still the best interests of the operation of the trust.

461 N.W.2d at 191 (citations omitted). A court's power to remove a trustee is "closely circumscribed" and necessary only when the objects of the trust are seen to be jeopardized. *In re Estate of Ragan*, 541 N.W.2d 859, 860 (Iowa 1995); *see also* Iowa Code § 633A.4107(2) (2009)[4] (setting forth statutory grounds for judicial removal of trustees, which include material breaches of the trust and hostility or lack of cooperation among co-trustees). "Judicial removal of a trustee usually will not be grounded on a mere error of judgment or conduct even though there is a technical breach of the trust, if the trust estate does not suffer." *Schildberg*, 461 N.W.2d at 191.

Our first task is to classify the type of trust at issue, so that we may determine whether the objects of the trust were endangered by Marvin's actions. The trust provided that after Ernest's death, the

[4] Although normally we decide cases based on the law in existence at the time of the parties' dispute, we choose to cite to the current version of the Iowa Trust Code because it simply renumbered the sections (by including an "A" after "633") that were in effect at the time of the parties' dispute in 2005. *See Kolb v. City of Storm Lake*, 736 N.W.2d 546, 553 n.6 (Iowa 2007). All citations in the opinion are to the 2009 Iowa Code unless otherwise indicated.

> Trustee shall pay all the net income from the Marital Trust to the surviving Grantor [Pauline], at least annually. The Trustee shall also pay to the surviving Grantor, such amounts of principal as the Trustee may deem necessary for the health, support and maintenance of the surviving Grantor.

This language creates a discretionary support trust, now referred by the latest Restatement of Trusts as a discretionary trust with standards. *See In re Estate of Gist*, 763 N.W.2d 561, 565 (Iowa 2009) (stating a grantor creates a discretionary trust with standards if "'the stated purpose of the trust is to furnish the beneficiary with support, and the trustee is directed to pay to the beneficiary whatever amount of trust income [or principal] the trustee deems necessary for his support'" (citation omitted)). Thus, while Pauline was alive, the trust was to be administered for her support. Erna nevertheless has an interest in the trust as a contingent beneficiary, and she is entitled to guard against damages to that interest. *See Cox v. Cox*, 357 N.W.2d 304, 306 (Iowa 1984) ("Even contingent remaindermen are entitled to guard against damage to their interest.").

In the district court proceedings, Erna argued Marvin should be removed as a co-trustee because he (1) failed to render an accounting to the beneficiaries; (2) commingled corporate assets with his own funds; (3) misappropriated corporate funds; and (4) did not act prudently in the farming practices he chose to employ. The district court rejected all but the last of these grounds, finding

> these trustees acted in good faith and believed that they were administering the trust according to the terms of the trust considering the purpose, terms and other circumstances. However, since January 30, 2006, it is this court's opinion that the trustees have not complied with the prudent man rule as required by Article XI of the trust.

The only reasoning the court provided was that "trustees exercising the judgment and care which persons of prudence, discretion and intelligence exercise in the management of their own affairs would not engage in the farming practice currently employed by Marvin."

1. Duty to act prudently. Article XI of the trust agreement, entitled "Prudent Man Rule," required the successor trustees to

> exercise the judgment and care under the circumstances then prevailing which persons of prudence, discretion and intelligence exercise in the management of their own affairs, not for the purpose of speculation, but with regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Although labeled as the "prudent man rule," the above-quoted provision also contains elements of what has become known as the "prudent investor rule." *See* J. Alan Nelson, *The Prudent Person Rule: A Shield for the Professional Trustee*, 45 Baylor L. Rev. 933, 934 (1993) [hereinafter Nelson].[5] The two rules are often confused, but the prudent person rule is much broader in scope. *Id*.

The prudent person rule imposes an overarching duty on a trustee "to administer the trust as a prudent person would, in light of the purposes, terms,

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[5] Comment "a" to the Restatement (Third) of Trusts section 90 explains the "prudent investor rule . . . is an extension and clarification of the traditional, so-called 'prudent man rule' originally articulated by the Massachusetts Supreme Judicial Court and followed by most states in the recent past." The case the Restatement refers to is *Harvard College v. Amory*, 26 Mass. 446, 469 (1830), in which the court stated,

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.

"In the 1940s and 1950s, practitioners began to distinguish *Harvard College*'s progeny into two separate rules: The Duty to Use Ordinary Skill and Prudence (The Prudent Person Rule) and The Prudent Investor Rule." Nelson, 45 Baylor L. Rev. at 935 (footnotes omitted).

and other circumstances of the trust." Restatement (Third) of Trusts § 77(1), at 81; *see also* Iowa Code § 633A.4203 ("A trustee shall administer the trust with the reasonable care, skill, and caution as a prudent person would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust."). The prudent investor rule, on the other hand, deals with the investment duties of the trustee. Nelson, 45 Baylor L. Rev. at 936; *see also* Iowa Code §§ 633A.4301-4309 (Uniform Prudent Investor Act).[6] It requires a trustee to "invest and manage trust property as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution." Iowa Code § 633A.4302(1).

At one time, the prudent investor rule broadly prohibited expansive categories of investments and techniques classified as "speculative." Restatement (Third) of Trusts, 6 Introductory Notes ch. 17, at 288. Since then, "[k]nowledge, practices, and experience in the modern investment world have demonstrated that arbitrary restrictions on trust investments are unwarranted and often counterproductive." *Id.* Speculation is no longer imprudent per se. *See id.* at 291 (criticizing case law and prior Restatements that have "condemned 'speculation' and excessive risk without definition, as if such risk could be recognized in the abstract without regard to portfolio context and objectives"). A trustee may accordingly make "investment and management decisions . . . as a

[6] Iowa Code section 633A.4309(4) states that the language used in Article XI of the trust agreement in this case invokes the prudent investor rule and allows the trustee to engage in "any investment or strategy permitted under this trust code."

part of an overall investment strategy having risk and return objectives reasonably suited to the trust." Iowa Code § 633A.4302(2).

The district court did not find fault with Marvin's investment strategy, although Erna urges "Marvin was speculating contrary to the express terms of the trust." As is clear from the foregoing, the prudent investor rule allows trustees to "invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust." Restatement (Third) of Trusts § 90, at 292; *see also* Iowa Code § 633A.4302(1). Marvin's use of a commodities broker and 1256 contracts was not imprudent per se, as Erna argues.

Erna next argues Marvin did not act prudently in administering the trust because he continued to operate the farm in the same manner their father had, rather than cash renting the corporation's farmland, which she asserts would have produced greater income for the beneficiaries and shareholders. The district court apparently accepted this argument. But the determination of whether a trustee has acted prudently focuses primarily on the "purposes, terms, and other circumstances of the trust." Restatement (Third) of Trusts § 77(1), at 81. Here, the purpose of the trust while Pauline was alive was to provide for her "support and maintenance." There is no dispute that occurred.

Marvin testified he continued to farm the land as Ernest had when he was alive because it

> takes a lot of money [to provide for Pauline's care]. It probably could creep up to 60,000 this year or better. And that's a lot for take-out of the profit end of the farming operation. And until that happens, we just can't mess with it, to disturb where that income is going to come from.

He was also mindful of the fact that it was his father's desire to see the farming enterprise continue after his death: "He just wanted it to go on. He wanted a legacy." Marvin accordingly used the same accountant, attorney, and commodities broker his father had employed. He also used a farm consultant, which resulted in higher yields for the farm. *See* Restatement (Third) of Trusts § 77 cmt. b, at 83 (emphasizing "the importance of obtaining competent guidance and assistance . . . sufficient to meet the standards required by the combination of care and skill in a given situation"). Marvin testified he was "doing the same things [Ernest had done]. We haven't really changed anything. So if I'm doing something wrong, I'm going to have to change from what we have done for 15, 20 years."

The trust agreement reflects Ernest and Pauline's desire to see that "the Heidecker Farms enterprise continues as a unit for a substantial period of time following their death." They accordingly set forth "a very definite plan for the control and ultimate distribution of the land contained in Heidecker Farms, Inc." That plan, as detailed earlier, required the successor trustees to

> vote the stock of the corporation so that the operation of the land contained in the corporation shall continue, with preference being given to the following methods of operation:
>
> 1. For at least two (2) years following the death of the last Grantor to die, the corporation shall operate the farmland in the same manner that it was being operated at the death of the last to die of the Grantors.
> 2. If it is not being cash rented at the end of said two (2) year period, it is our direction that the corporation lease the land on a cash rent basis, preference being given to any family member who is then actively engaged in farming. . . .

Pauline did not voice any objections to Marvin about his management of the farm following Ernest's death, although she wrote some notes expressing some dissatisfaction with Marvin. Those notes were never shown to Marvin or delivered to Pauline's attorney, to whom some were addressed. Marvin accordingly continued to operate the corporation in the same manner his father had. We fail to see how Marvin acted imprudently in doing so and in resisting Erna's premature efforts to move to a cash rent operation. As our supreme court recognized in *Schildberg*:

> "The beneficiary often conceives that he could manage the trust better than the trustee, resents failure to follow his advice, is dissatisfied with returns, thinks that the trustee is too conservative in his investment policies, and otherwise finds fault with the trustee. Thus friction develops. But the settlor has entrusted the management to the trustee not to the beneficiary. The very fact that he created a trust showed that he did not want the beneficiary to be the controlling factor in the management of the property."

461 N.W.2d at 192-93 (quoting G. Bogert, *Law of Trust & Trustees* § 160, at 577 (5th ed. 1973)). In light of the foregoing, we conclude the district court's decision removing the trustees under the prudent person rule and appointing a receiver "to take possession of the assets of the trust and administer the trust" should be reversed.

For the reasons that follow, we also find no merit to the alternative grounds raised by Erna in support of Marvin's removal as trustee—his failure to provide an accounting and his deposit of corporate funds into his own checking account.

***2. Duty to account*.** A trustee has a duty to provide an accounting to the beneficiaries. *Schildberg*, 461 N.W.2d at 191; *see also* Iowa Code § 633A.4213;

Restatement (Third) of Trusts § 82 cmt. d, at 186 ("Disclosure is fundamental to sound administration of the trust, and to both the trustee's performance and the beneficiaries' monitoring of associated fiduciary obligations."). "In addition, the beneficiary is entitled to adequate information regarding the trust, i.e., what the trust is and how the trustee has dealt with it." *Schildberg*, 461 N.W.2d at 191.

It is true Marvin did not provide an accounting to Erna or Myra while he was administering the trust on behalf of his mother. Nor did he provide an accounting once he was officially appointed co-trustee with Erna and Myra. His omission "constituted a technical breach of the trust agreement." *Id.* But, as in *Schildberg*, we find no evidence indicating that omission resulted from a motive on Marvin's part to take advantage of the beneficiaries. *Id.* There is also no evidence the effectiveness of the trust was impaired or the intent of the settlers was thwarted, as is required for removal of a trustee. *Id.*

Further, we observe that in these proceedings Marvin provided Erna with all of the corporate tax returns from 1998 through 2007. He also provided her with summaries of transactions between himself and the corporation for 1994 through 2007. Once Erna became a co-trustee of the trust and director of the corporation in 2006, she was able to and did access all of the books and records of the trust. Although she now complains Marvin failed to provide her with complete copies of his personal tax returns, she did not designate a CPA as an expert witness to review those records, as required by the district court's discovery order. We find no abuse of discretion in that ruling. *See Mediacom Iowa, L.L.C. v. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004). And we see no

need for Marvin to provide any further accounting to Erna for past expenditures of the trust and corporation, as that information has already been provided to her.

3. Duty of loyalty. "A trustee owes a duty of loyalty to the trust and to its beneficiaries and must act in good faith in all actions affecting the trust." *Schildberg*, 461 N.W.2d at 191-92. Iowa Code section 633A.4202(1) accordingly requires a trustee to "administer the trust solely in the interest of the beneficiaries" and to "act with due regard to their respective interests." Erna argues Marvin breached this duty by commingling corporate funds with his own.

After Ernest died, Marvin continued the practice instituted by Ernest whereby he deposited government program payments and crop proceeds from the corporation's farmland into his personal checking account, which he then used to pay farming expenses throughout the year. At the end of every year, Marvin brought records of his transactions to the corporation's accountant, who reconciled the accounts. Although the accountant found Marvin owed the corporation $35,778.09 at the time of the trial, he found no instances of Marvin misappropriating corporate funds. Nor did Erna's expert witness.

Restatement (Third) of Trusts section 84 nevertheless suggests Marvin breached his duty of loyalty to the trust by commingling corporate funds with his own. That section states a trustee has a duty "to keep the trust property separate from the trustee's own property and, so far as practical, separate from other property not subject to the trust." Restatement (Third) of Trusts § 84, at 214. A comment explains it is thus "improper for a trustee to deposit money of the trust in the trustee's personal account in a bank, even if the trustee maintains records continuously and carefully showing the trust's interest in the account."

Id. cmt. b, at 214. Although the "general prohibition against commingling trust property with the trustee's own is strictly applied, based on the duty of loyalty's prohibition against a trustee's creation of potentially conflicting interests," an exception is recognized when the terms of the trust expressly or impliedly make such commingling proper. *Id.* cmts. b, e, at 215, 217; *see also Schildberg*, 461 N.W.2d at 192 (quoting Restatement (Second) of Trusts section 170 (1959), which provided that a trustee can "deal with the trust property on his own account" where permitted by the terms of the trust). We believe that exception is applicable here.

Article VIII of the trust, which sets forth the powers of the trustees, gives the trustees considerable freedom in managing the trust's farming operation. Marvin's accounting practices were the same ones used by Marvin during Ernest's operation of the farming corporation. *See Schildberg*, 461 N.W.2d at 192 ("[W]here the settlor knows of a potential conflict of a trustee, yet appoints him, the conflict will ordinarily not be a ground for removal."). Although commingling corporate monies with Marvin's personal monies is not condoned, the reconciliation of record at year's end by the accountant has adequately protected the other beneficiaries.

B. Order to Cash Rent.

In fashioning "other appropriate relief" under the authority of Iowa Code section 633A.4502, the court concluded the 2009 crop year should "be operated as it has been in past because of the difficulty of untangling the financial arrangements now. However, for the 2010 crop year, the farmland shall be cash rented."

Provision for management of the farm after Pauline's death is clear and specific. Article IV of the trust agreement provides that during the continuation of the trust after the death of the last grantor (Pauline), preference is given to the following methods of operating the farm: For at least two years following the death of the last grantor to die, "the corporation *shall* operate the farmland in the *same* manner that it was being operated at the death of the last to die of the Grantors." (Emphasis added.) If the farm was not being cash rented at the end of the two-year period, it was the grantors' direction that the corporation lease the land on a cash rent basis. As a third alternative, crop sharing was authorized as a method of operation. Notwithstanding the foregoing three alternatives of operation, the trust also permitted the trustees to make other arrangements for the operation of the farmland "if circumstances arise which, in the judgment of the Trustees, make that desirable."

The farm was not being cash rented when Pauline died. For the reasons stated in our reversal of the district court's removal of trustees, we conclude the court's decision to require the farm to be cash rented beginning with the 2010 crop year, before the end of the two-year period, should be reversed.

By the time the 2011 crop year begins, the two-year period since Pauline's death will have passed. It is the grantors' direction that two years after the death of the last grantor the farm be operated on a cash rent basis. Upon our de novo review, we conclude operating the farm on a cash rent basis, beginning with the 2011 crop year, is necessary to carry out the purposes of the trust. Marvin shall not comingle trust and corporate monies with his own personal accounts, or the personal accounts of his family members. To that end, Marvin shall maintain a

separate account, or accounts, for all trust and corporate income and expenses, which will include the cash rent and all expenses associated with cash renting the farm, and he shall make full financial accountings of his operation of the farm. We reverse that portion of the district court's decree requiring the farmland of the trust to be cash rented beginning with the 2010 crop year, and remand to the district court to enter an order consistent with this opinion.

We turn next to the district court's summary removal of Marvin as a director and officer of Heidecker Farms.

C. Removal of Marvin as Director and Officer.

Iowa Code section 490.809 governs removal of directors of corporations by judicial proceedings. That section provides that a court may remove

> a director of the corporation from office in a proceeding commenced by or in the right of the corporation if the court finds that both of the following apply:
>
> a. The director engaged in fraudulent conduct with respect to the corporation or its shareholders, grossly abused the position of director, or intentionally inflicted harm on the corporation.
>
> b. Considering the director's course of conduct and the inadequacy of other available remedies, removal would be in the best interest of the corporation.

Iowa Code § 490.809(1).[7]

Erna's claims of fraud are unfounded. The testimony of the corporation's accountant and Erna's own expert revealed Marvin did not misappropriate funds or engage in other fraudulent behavior. Erna's claims that Marvin was using the

[7] Although not raised by Marvin, we question whether Erna complied with section 490.809(2), which requires a "shareholder proceeding on behalf of the corporation under subsection 1" to "comply with all of the requirements of division VII, part D, except section 490.741." Section 490.742 in division VII, part D of chapter 490 provides a "shareholder shall not commence a derivative proceeding until . . . [a] written demand has been made upon the corporation to take suitable action" and ninety days have expired from the date the demand was made. No such demand appears in the record.

farm for his own benefit are also unfounded. Marvin received the same employee benefits from the corporation at the time of trial as he did when his father was alive. Her speculation that he was abusing his position as a director and officer of the corporation was just that—speculation. We find no basis for Marvin's removal as director and officer of the corporation and reverse that portion of the court's decision. *See* Iowa Code § 490.843(2) (setting forth requirements for removal of an officer of a corporation by the board of directors or other officers).

D. Erna's Remaining Claims.

Erna raised a multitude of claims in her cross-appeal, most of which have been addressed above. The claims that remain concern the district court's refusal to order a sale of Erna's or Marvin's shares in the corporation and, in the alternative, its refusal to require the receiver it appointed to convert the class-C corporation into three sub-S corporations. We need not address the latter claim, as we have determined the court's appointment of the receiver was in error. We accordingly focus on Erna's contention that the court should have required Marvin to either purchase her shares in the corporation or sell his shares to her.

This court has long recognized a court's equitable power in a shareholder proceeding seeking judicial dissolution of a corporation to instead order majority shareholders to purchase the shares of the minority where oppression, waste, or misapplication of corporate assets has been found. *See Maschmeier v. Southside Press, Ltd.*, 435 N.W.2d 377, 381 (Iowa Ct. App. 1988); *accord Sauer v. Moffitt*, 363 N.W.2d 269, 275 (Iowa Ct. App. 1984); *see also* Iowa Code §§ 490.1430(2)(b), (d) (authorizing judicial dissolution of a corporation where the

directors or those in control of the corporation have acted, are acting or will act in a manner that is illegal, oppressive, or fraudulent, or where corporate assets are being misapplied or wasted), .1434(1) (allowing non-petitioning shareholders in judicial dissolution proceeding to elect to purchase "all shares owned by the petitioning shareholder at the fair value of the shares"). Our foregoing discussion shows Marvin did not waste or misapply corporate assets. Erna nevertheless argues he engaged in oppressive conduct in an attempt to freeze her out of the corporation. We do not agree.

Oppressive conduct "is an expansive term used to cover a multitude of situations dealing with improper conduct which is neither illegal nor fraudulent." *Maschmeier*, 435 N.W.2d at 380. It encompasses conduct that is

> "burdensome, harsh and wrongful . . .; a lack of probity and fair dealing with the affairs of a company to the prejudice of some of its members, or a visual departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Id. (citation omitted).

> The alleged oppressive conduct by those in control of a close corporation must be analyzed in terms of "fiduciary duties" owed by majority shareholders to the minority shareholders and "reasonable expectations" held by minority shareholders in committing capital and labor to the particular enterprise, in light of the predicament in which minority shareholders in a close corporation can be placed by a "freeze-out" situation.

Id. Examples of "freeze-out" situations are where majority shareholders terminate the employment of minority shareholders, prohibiting their participation in the business, or where majority shareholders refuse to declare dividends, but provide themselves with high compensation, leaving minority shareholders who do not hold corporate office little or no return on their investment. *Id.*; *see also*

Brodie v. Jordan, 857 N.E.2d 1076, 1079 (Mass. 2006) (setting forth other examples of freeze-outs).

In *Maschmeier*, we affirmed the trial court's order requiring a forced buyout where the majority shareholders sold most of the corporation's assets to themselves for a low price, paid themselves salaries in excess of the corporation's gross receipts, established a competing business, and terminated the minority shareholders' employment with the corporation and prohibited them from borrowing on their pension and profit sharing plan. 435 N.W.2d at 380-81. Similarly, in *Sauer*, we found a forced buyout was an appropriate remedy where the majority shareholders were "unable to account for property and income diverted from the corporation over the years because of their mismanagement or fraudulent acts." 363 N.W.2d at 275. We stated some

> of the most glaring actions or inactions were: the failure to maintain proper and accurate books and records; the commingling of [a director's] crops with those of the corporation; the diversion of assets of [the] Corporation into the defendants' livestock operation; and the failure to provide [minority shareholders] with proper notice of the board of directors meetings.

Id. at 274.

Marvin has not engaged in any similar conduct in his operation of Heidecker Farms. He is paid an annual salary of about $30,000, plus periodic bonuses, as an employee of the corporation and receives the same employee benefits he received when Ernest managed the farm. His son also is paid a salary and receives employee benefits. Marvin maintains accurate records of his dealings with the corporation and trust, which defeat Erna's claims of fraud and misappropriation of corporate funds. Once the corporation's board of directors

began meeting, Marvin provided Erna with timely notice of the meetings and invited her participation in them. He did not terminate her from any position of employment in the corporation, although he and Myra later voted to remove her as an officer and director of the corporation after she filed the present lawsuit. Marvin has not sold or depleted any corporate assets. Nor has he offered to buy Erna's shares in the corporation at a low price, which one commentator has identified as the "'capstone of the majority plan' to freeze-out the minority of any financial benefits from the close corporation." 12B William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5820.10 (Thomson Reuters ed. 2009).

On the whole, we cannot say Marvin acted in an oppressive manner in his management of the corporation. We accordingly affirm the district court's refusal to order a forced buyout of either Erna or Marvin's shares in the corporation.

E. Attorney Fees.

The court's decree provided that Erna's attorney fees and expert witness fees would be paid from trust assets, subject to a hearing to determine the amount. Iowa Code section 633A.4507 provides "the court, as justice and equity may require, may award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party or from the trust that is the subject of the controversy." After the parties had appealed and cross-appealed, the court held a hearing and approved Erna's claim for trial attorney fees, expert witness fees, and costs in the amount of $50,180.71. The clerk of court then entered judgment against Marvin. The court later issued an order nunc pro tunc providing that the award be a judgment against the trust, not Marvin. Marvin separately appealed

the fee award, *see Iowa State Bank & Trust Co. v. Michel*, 683 N.W.2d 95, 110 (Iowa 2004), but his motion to consolidate that appeal with the appeal from the decree was denied by our supreme court. Having now caught up with the first appeal, we consider Marvin's appeal regarding the award of attorney fees.

We first note that Erna filed a motion with our supreme court to dismiss Marvin's appeal from the fee award. She asserted the appeal was not timely filed. Finding the appeal timely, the supreme court denied the motion. Without mentioning that the supreme court previously ruled upon the issue, Erna raised the same issue as a proposition in her appellate brief. Having been previously and conclusively decided by our supreme court, it was improper to reiterate the issue in her brief. *See Wederath v. Brant*, 319 N.W.2d 306, 310 (Iowa 1982) ("We question that a party can proceed in such a manner, otherwise [supreme court] orders on motions would not have finality regarding the point ruled on."). We therefore tax the cost of Erna's brief to her attorney.

Upon our review, we cannot characterize Erna as the prevailing party. Nor do we find that justice and equity require an award of fees to Erna. We conclude that circumstances warrant the parties pay their own fees and expenses. We therefore reverse the district court's award of attorney fees, expert witness fees, and costs.

IV. Conclusion.

Having carefully considered all of the issues raised in the appeals, whether specifically mentioned or not, we conclude the decision of the district court should be affirmed in part and reversed in part. We reverse the court's removal of the trustees of the trust, Marvin's removal as a director and officer of

the corporation, and appointment of a receiver "to take possession of the assets of the trust and administer the trust." We also reverse the court's order that the farmland be cash rented beginning with the 2010 crop year and we remand for an order requiring that, among other things, the land be cash rented beginning with the 2011 crop year. We affirm the court's decision denying Erna's requests for an accounting and a forced buyout of her or Marvin's shares in the corporation. We reverse the court's order regarding the award of attorney fees, expert witness fees, and costs. Costs of the appeal are assessed to the trust. Costs of Erna's brief filed in docket number 10-0273 are taxed to Erna's attorney.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.